

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

)  
)  
) **DEFENSE MOTION TO**  
) **STRIKE THE WORD**  
) **"TERRORISM" FROM**  
) **CHARGE 1: TERRORISM**  
) **IS NOT AN OFFENSE TRIABLE**  
) **BY MILITARY COMMISSION**  
)

4 October 2004

The defense in the case of the *United States v. David M. Hicks* moves to strike the word "terrorism" from Charge 1 on the ground that terrorism is not an offense under the law of war, and states in support of this motion:

1. **Synopsis:** Terrorism is not a cognizable offense under the law of war, and is therefore not triable by military commission.
2. **Facts:** The motion requires a response to a question of law, relating to the law of war.
3. **Discussion:**

**A: Introduction — The Military Commission Lacks Subject-Matter Jurisdiction**

Military Commission Instruction No. 2 directs that this military commission can try only those offenses that existed under the law of war at the time of their commission. In fact, Section 3(A) explicitly states that "[n]o offense is cognizable in trial by a military commission if that offense did not exist prior to the conduct in question." In addition, international law prohibits States from charging individuals with conduct that did not constitute a criminal offense at the time of its commission: Article 15(1) of *International Covenant on Civil and Political Rights* (ICCPR)<sup>1</sup> provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Article 75(4)(c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)<sup>2</sup> provides the same, as does the U.S. Constitution, Art. I, sec. 9, cl. 1, which prohibits *ex post facto* laws.<sup>3</sup>

No American military commission has ever charged or tried an individual with the offense of "terrorism." That is fully consistent with established principles, since "terrorism" is

<sup>1</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.

<sup>2</sup> Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>>.

<sup>3</sup> The language of Article 75(4)(c) of Additional Protocol I is very similar to Article 15 of the ICCPR. It states "[n]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed".

RE

Page

1 of 4

not an offense under the law of war. Consequently, it is not within the jurisdiction of a military commission. The only other source of jurisdiction for a military commission to charge and adjudicate an allegation of “terrorism” is Congress, but without a specific authorization from Congress that this military commission can try individuals for “terrorism,” it does not possess subject matter jurisdiction to do so. Yet Congress has *not* so authorized the offense of “terrorism” in the context of military commissions; as a result, this military commission lacks jurisdiction to try Mr. Hicks for conspiracy to commit terrorism.

## **B: Terrorism Is Not a War Crime**

As one commentator has explained, “[t]here is no doubt that the international community has a vested interest in the prosecution of individuals suspected of committing acts of international terrorism. Pursuing this worthy goal actually raises many issues, however, not the least of which is the fact that there is no international recognized definition of terrorism.”<sup>4</sup>

Nor is there even an internationally accepted definition of “terrorism” as a substantive offense. While there are currently 12 international conventions relating to specific acts which fall under the rubric of “terrorism,”<sup>5</sup> international criminal law and the law of war have failed to agree upon a definition of “terrorism” itself as a substantive offense. Indeed, “[o]ne of the most challenging problems for prosecutors in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law. Several international treaties cover acts that fall under the general category of terrorism, although, as noted above, the general practice is to prosecute individuals for the underlying criminal acts, not for the undefined crime of ‘terrorism.’”<sup>6</sup>

Indeed, even the U.S. has recognized the absence of a universal definition of terrorism in the international context – a sharp but telling divergence from its current position before this commission. When drafting the *Rome Statute of the International Criminal Court* (ICC Statute) between 1996–98, “the United States vigorously opposed the inclusion of terrorism within the ICC’s jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorist cases.”<sup>7</sup> Ultimately, the U.S. prevailed: the ICC Statute, which now represents the most recent, universally accepted and comprehensive list of war crimes does not list “terrorism” amongst its 51 types of war crimes.<sup>8</sup>

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<sup>4</sup> Daryl A. Mundis, “Prosecuting International Terrorists,” *Terrorism and International Law: Challenges and Responses* (International Institute of Humanitarian Law and the George C. Marshall European Center for Security Studies, 2003), p. 85.

<sup>5</sup> For a full explanation of all past conventions considered and adopted see, C. Bassiouni, *International Terrorism: Multilateral Conventions* (1937–2001) (available on request).

<sup>6</sup> Daryl A. Mundis, “Prosecuting International Terrorists,” *Terrorism and International Law: Challenges and Responses* (International Institute of Humanitarian Law and the George C. Marshall European Center for Security Studies, 2003), p. 88 (citations omitted).

<sup>7</sup> David Stoelting, “Military Commissions and Terrorism,” 31 *Denver Journal International and Policy* 427 (2003).

<sup>8</sup> See Article 8 — War Crimes, *Rome Statute of the International Criminal Court*. Available at <<http://www.un.org/law/icc/statute/rome.htm>>.

In April 2000, the U.S. State Department reiterated the lack of an accepted definition of terrorism in its report on the "Patterns of Global Terrorism."<sup>9</sup> It reported, "no one definition of terrorism has gained universal acceptance." Thus, due to international disagreement, and the ongoing attempt to create an internationally accepted definition of terrorism, no substantive offense of terrorism exists under international criminal law or the law of war.

"Terrorism" remains a descriptive term, which encompasses a wide range of precise substantive offenses under international law (such as hijacking and taking of hostages), rather than a substantive offense itself. Thus, it is not available here as a component of the conspiracy charge.

#### **C: Congress Has Not Made "Terrorism" an Offense Triable by Military Commission**

Other than offenses already cognizable under the law of war, Congress has designated only two other offenses to be eligible for trial by military commission: those enumerated in Articles 104 and 106 of the Uniform Code of Military Justice. Article 104 relates to "Aiding the enemy," and Article 106 relates to "Spies." In stark contrast, Congress has *not* enacted legislation making terrorism an offense triable by military commission.

The President's Military Order of 13 November 2001<sup>10</sup> seeks to establish a forum for trying persons accused of acts of terrorism. In its opening sections, it states that military commissions are needed due to "the nature of international terrorism" for "the prevention of terrorist attacks." Section 2 states that its purpose is to create a forum to try members of al Qaeda and any person who "has engaged in, aided and abetted, or conspired to commit, acts of international terrorism."

Despite these pronouncements, the Military Order cannot confer jurisdiction on military commissions to try the offense of terrorism unless that offense pre-existed the commission of those offenses under the law of war. Only Congress has the power legislate to create new offenses triable by military commission, and it has not done so here – nor could it at this time, since such designation would constitute an impermissible *ex post facto* law.

#### **D: Conclusion**

At the time that Mr. Hicks allegedly conspired to commit an act of "terrorism," there was no internationally recognized substantive offense of terrorism under international criminal law or the law of war. Therefore, military commission (subject matter) jurisdiction to try Mr. Hicks for a charge of conspiracy to commit terrorism does not exist, and any references to "terrorism" in the charges must be stricken as a result.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

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<sup>9</sup> Available at <<http://www.state.gov/www/global/terrorism/1999report/patterns.pdf>>.

<sup>1</sup> Military Order of 13 November 2001, 66 Fed. Reg. 57833 (16 November 2001).

**5. Evidence:**

**A:** The testimony of expert witnesses.

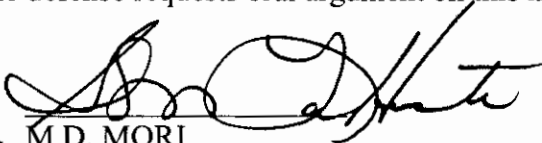
**B:** Attachments

1. *International Covenant on Civil and Political Rights*, Article 15.
2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.
3. Daryl A. Mundis, "Prosecuting International Terrorists," *Terrorism and International Law: Challenges and Responses*, pp. 85-95 (2003).
4. David Stoelting, "Military Commissions and Terrorism," 31 *Denver Journal International and Policy* 427 (2003).
5. *Rome Statute of the International Criminal Court*, Article 8 — War Crimes.
6. U.S. State Department, "Patterns of Global Terrorism" (2000).

**6. Relief Requested:** The defense requests that the word "terrorism" be struck from Charge 1.

**7.** The defense requests oral argument on this motion.

By:



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**Office of the High  
Commissioner for Human Rights**



## **International Covenant on Civil and Political Rights**

**Adopted and opened for signature, ratification and accession by  
General Assembly resolution 2200A (XXI) of 16 December 1966**

**entry into force 23 March 1976, in accordance with Article 49**

### **status of ratifications**

### **declarations and reservations**

### **Preamble**

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## **PART I**

### **Article 1 ►► General comment on its implementation**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no

Attachment 1 to RE       

Page 1 of 2

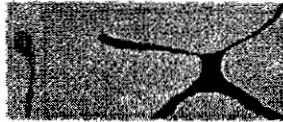
**Article 15**

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Attachment 1 to RE       

Page 2 of 2



fulltext



**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.**

**PREAMBLE.**

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

Have agreed on the following:

**PART I. GENERAL PROVISIONS**

**Art 1. General principles and scope of application**

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

Attachment 2 to RE \_\_\_\_\_

Page 1 of 3

## Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine or have examined

Attachment 2 to RE

Page 2 of 3



the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Attachment 2 to RE \_\_\_\_\_  
Page 3 of 3

# PROSECUTING INTERNATIONAL TERRORISTS

Daryl A. MUNDIS (\*)

## I. Introduction

There is no doubt that the international community has a vested interest in the prosecution of individuals suspected of committing acts of international terrorism. Pursuing this worthy goal actually raises many issues, however, not the least of which is the fact that there is no internationally recognized definition of terrorism *per se*.<sup>1</sup> Prior to the large-scale crimes that were committed in the United States on September 11, 2001, the typical terrorist crimes included offences against aircraft, such as hijacking; bombings of government buildings or facilities, such as the U.S. Embassies in Africa or U.S. military installations in the Middle East; or civilian buildings, such as the 1993 bombing of the World Trade Center. All of this changed after September 11, however, due both to the scale of the crimes committed and the methods by which the perpetrators carried them out. The objectives of this brief paper are to:

- explore the possible forums for the prosecution of international terrorism;
- analyse the applicable substantive law concerning the crime of terrorism;
- discuss procedural issues arising from terrorism trials; and
- discuss evidentiary issues concerning such trials.

## II. Choice of Forum

In the wake of the terrorist attacks on the United States in September 2001, the issue of where the alleged perpetrators of these crimes should be tried was among the hottest topics of discussion among international lawyers.<sup>2</sup> The following legal fora might have jurisdiction over such cases: the International Criminal Court (ICC)<sup>3</sup>; an *ad hoc* International Criminal Tribunal for the Prosecution of Acts of Terrorism, similar to the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); some other type of Special Court, like those in Kosovo, East Timor or Sierra Leone; national civilian courts, including "regular" or special courts; or military courts-martial or tribunals. Each of these options will be discussed.

### A. International Criminal Court

The ICC does not have specific jurisdiction for crimes considered acts of terrorism. However, the underlying criminal act could provide the basis for one of the crimes for which the ICC *does* have subject matter jurisdiction, such as war crimes or crimes against humanity. With respect to war crimes pursuant to Article

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8 of the ICC Statute, such acts must be committed *during* an armed conflict. Under the ICC Statute, the elements of war crimes do *not* include a plan or policy to commit the offence and the scale of the alleged criminal acts does not form part of the offence.<sup>4</sup> Article 7 of the ICC Statute governs crimes against humanity and in accordance with the jurisdictional elements of that offence, the attack must be directed against a civilian population and be part of a widespread or systematic attack,<sup>5</sup> committed pursuant to or in furtherance of a State or organisational policy.<sup>6</sup>

*B. Ad Hoc International Criminal Tribunal for the Prosecution of Acts of Terrorism*

It would be possible for the UN Security Council to establish an *ad hoc* International Tribunal for the Prosecution of Persons Responsible for Committing Terrorism, similar to the ICTY and ICTR. Based on the experience of the Security Council in establishing the ICTY and ICTR, however, such international criminal tribunals have historically been used only when national courts have completely broken down, which is not the case in most of the States that are likely to prosecute alleged terrorists. Moreover, building such tribunals is slow, costly and requires a significant level of political will.

*C. Special Courts*

Special Courts, similar to the models used by the international community in Sierra Leone, Kosovo, or East Timor, could be established to prosecute crimes of international terrorism.<sup>7</sup> Such a court or courts could be located where the crimes were committed, with the local judiciary and prosecution supplemented by international involvement, including international judges and prosecutors. The Special Court could be structured in such a way as to include members of specific ethnic or other groups, such as Muslim judges or prosecutors in the case of the September 11 attacks. Special Courts typically receive significant international financial and logistical assistance.

*D. National Courts*

Concerning prosecution of alleged terrorist acts in national courts, two issues arise: which nation's courts would have jurisdiction (and perhaps which State is best suited to pursue the prosecution), and once that issue is determined, which court within that State? The first issue concerns jurisdiction and may raise issues concerned with extradition. States have historically asserted jurisdiction under international criminal law on one or more of the following bases:<sup>8</sup>

- Territorial Jurisdiction (location where the crime was committed);
- Active Personality Principle (crime committed by a national of the State seeking to assert jurisdiction);
- Passive Personality Principle (the victim was a national of the State seeking to assert jurisdiction); and/or
- Protective Principle (the criminal conduct affects the security or other important interests of the State seeking to assert jurisdiction).

In the event that more than one State could assert jurisdiction, other issues may surface, including which State is best suited to conduct the prosecution. Moreover, if the accused is in custody, issues concerning extradition may arise if the State seeking to assert jurisdiction does not have custody of the accused. These issues are beyond the scope of this article. However, suffice it to say that they may raise significant hurdles to prosecution and in fact may actually preclude prosecution. For example, the accused may avoid trial if the custodial State is unable to exercise jurisdiction, and unwilling or unable<sup>9</sup> to extradite the individual to a State which may impose the death penalty, and other States that do not impose the death penalty are similarly unable to exercise jurisdiction.

Assuming that the jurisdictional issues (and any other issues concerning choice of forum and extradition) are resolved, the next issue concerns the choice of which national court is the appropriate forum to conduct the prosecution. There are essentially three options, depending on the State concerned: "regular" civilian courts, special courts, and military courts.<sup>10</sup> Each of these options has pros and cons and will be discussed in turn.

1. *"Regular" Civilian Courts*

The primary advantages of proceeding in "regular" civilian courts are that because such courts pre-date the acts of terrorism, there are generally no human rights or due process concerns, and they afford public trials. On the other hand, trial in such courts can be problematic for several reasons. First, the prosecution may be hindered in presenting evidence due to the source of that information. When derived from the intelligence community, national authorities may be reluctant to allow certain evidence (or its sources) to be disclosed in court. Second, significant security concerns arise with respect to the witnesses, victims, jurors, judges, and court personnel. Third, many national criminal procedure and evidentiary codes do not contain provisions allowing for variations in certain types of trials. For example, problems relating to evidentiary exclusions, prohibitions on hearsay evidence or evidentiary chains of custody may prove fatal to successful prosecution of terror charges.

2. *Special Courts*

To alleviate these problems, many States have tailored provisions permitting certain types of offences, such as terrorism, to be prosecuted in special courts, with special procedural and evidentiary rules. For example, witnesses may be permitted to testify anonymously or judges may be permitted to preside over such trials anonymously. In some instances, the right of the accused to confront the witnesses or evidence against him or her may be curtailed. Many of these special courts have failed to meet international necessary process standards with respect to the rights of the accused.

3. *Military Courts*

To alleviate some of these concerns, some States use military courts, a term which may include courts-martial, military tribunals or military commissions.<sup>11</sup>

Military courts tend to have several significant advantages over civilian courts. First, trials may be conducted expeditiously. Second, trials before military courts may be held virtually anywhere in the world, with no need for significant physical infrastructure or resources. Third, because the legal bases for such courts typically pre-date the alleged crimes, they are usually free from the criticism that they were created for specific purposes.<sup>12</sup> Finally, military courts usually have procedures, such as various forms of protective measures, for adducing evidence from intelligence sources.

On the other hand, military trials may raise human rights concerns, particularly where the accused is a civilian, or when the court's assertion of personal jurisdiction may not be solidly grounded. Moreover, such proceedings may tend to be conducted without full public access, with all the problems inherent in such secret proceedings. Finally, trial by military courts may raise constitutional issues, such as separation of powers.

### *III. Substantive Law*

One of the most challenging problems for prosecutors in facing terrorism trials is the lack of a clear definition of the crime and a total absence of case law under international law.<sup>13</sup> Several international treaties cover acts that fall under the general category of terrorism, although, as noted above, the general practice is to prosecute individuals for the underlying criminal acts, not for the undefined crime of "terrorism." In addition, there are several regional efforts, particularly within the European Union, to define and prosecute crimes of terror.

#### *A. Substantive Law: International Agreements*

Several multinational treaties criminalize specific offences as falling under the rubric of terrorism. Clifton M. Johnson, an attorney-adviser in the U.S. State Department and formerly the Department's primary attorney on terrorism issues, has identified seven provisions that are common to recent antiterrorism conventions.<sup>14</sup> These treaty provisions:

1. Apply only to crimes with an international element;
2. Obligate States Parties to criminalize the covered offences irrespective of the motivation of the perpetrators;
3. Obligate States Parties to take into custody offenders found on their territory;
4. Facilitate the extradition of offenders;
5. Require States Parties to afford one another the greatest measure of assistance in connection with criminal investigations or proceedings related to the enumerated crimes;
6. Prohibit the political offence doctrine being the grounds for the refusal of an extradition or request for mutual legal assistance;
7. Provide for the transfer of prisoners in order to assist the investigation or prosecution of covered offences.<sup>15</sup>

The following international treaties have provisions outlawing crimes that

have come to be considered acts of terrorism, and, as such, provide the substantive law bases for prosecuting acts of terrorism.<sup>16</sup>

Convention for the Suppression of Unlawful Seizure of Aircraft ("Hijacking Convention") (1970).<sup>17</sup> Article 1 of this treaty provides that any person on board an aircraft in flight who unlawfully, by force or threat thereof (or by any other form of intimidation), seizes or exercises control of the aircraft or attempts to do so or acts as an accomplice to anyone who performs such acts, commits the offence of hijacking.<sup>18</sup>

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the "Safety of Aircraft Convention" of 1971.<sup>19</sup> This Treaty prohibits several acts,<sup>20</sup> including:

- acts of violence against other persons on board the aircraft if such acts are likely to endanger the safety of the aircraft;
- destruction of the aircraft rendering it incapable of flight or which is likely to endanger its safety in flight;
- placing a device or substance on board the aircraft that is likely to destroy the aircraft, render it incapable of flight or which is likely to endanger its safety in flight;
- destruction of or interference with air navigation facilities or their operation if such acts are likely to endanger the safety of aircraft in flight; or
- communication of information known to be false which endangers the safety of an aircraft in flight.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, the "Convention on Protection of International Persons" of 1973.<sup>21</sup> This Treaty prohibits the murder, kidnapping, or attack upon the person or liberty of an "internationally protected person," including diplomats.<sup>22</sup> Moreover, it also proscribes a violent attack on the official premises, private residence, or means of transport of such persons, if the attack is likely to endanger their safety or liberty.<sup>23</sup> The Convention also forbids threats<sup>24</sup> and attempts to commit these offences,<sup>25</sup> and includes a provision setting forth accomplice liability.<sup>26</sup>

International Convention Against the Taking of Hostages, the "Hostage-Taking Convention" of 1979.<sup>27</sup> Article 1 of this Convention provides that:

- Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking").<sup>28</sup>

The Convention on the Physical Protection of Nuclear Materials of 1980.<sup>29</sup> This Treaty seeks to safeguard nuclear material<sup>30</sup> and requires States Parties to enact national legislation prohibiting the following offences:<sup>31</sup>

- unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or injury to any person or substantial damage to property;
- theft, robbery, embezzlement or fraudulent obtaining of nuclear material;
- acts constituting a demand for nuclear material by threat, use of force or other means of intimidation;
- threat to use nuclear material to cause death, serious injury or substantial property damage; and
- attempts to commit any of the above acts or any act that constitutes participation in any of the above acts.<sup>32</sup>

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation of the International Airport Security Convention of 1988.<sup>33</sup> This Convention supplements the Safety of Aircraft Convention of 1971 by extending that treaty to cover similar acts committed at airports.<sup>34</sup>

Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the "Maritime Navigation Safety Convention" of 1988.<sup>35</sup> This convention prohibits a wide range of activities that endanger the safe navigation of ships at sea, including:

- seizure or the unlawful exercise of control over a vessel;
- acts of violence against persons on-board the vessel;
- destruction of the ship or its cargo;
- the placing of a device or substance on the ship that it likely to endanger the vessel;
- destruction of maritime navigation facilities;
- false communication likely to endanger the safe navigation of the vessel; and
- killing or injuring any person during the attempted commission of any of these offences.<sup>36</sup>

Article 2 of this treaty, like many of the other treaties referred to in this section, proscribes attempts to commit any of these offences and sets forth accomplice liability.<sup>37</sup> Article 2(c) also makes it an offence to threaten another person to commit certain of the enumerated acts.<sup>38</sup>

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of the "Safety of Fixed Platforms on Continental Shelf Convention" of 1988.<sup>39</sup> This agreement, which supplements the Maritime Navigation Safety Convention, imports many of the provisions of that treaty for the protection of crimes committed on board or against fixed platforms located on the continental shelf.

The International Convention for the Suppression of Terrorist Bombings of 1997.<sup>40</sup> Article 2 of this important convention provides that any person commits an offence under this treaty if that person:

- unlawfully or intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place or public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily harm;<sup>41</sup> or
- with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.<sup>42</sup>

The treaty also provides for the criminalization of attempts to commit any of the offences listed above<sup>43</sup> and for broad accomplice liability.<sup>44</sup>

The International Convention on Suppression of Financing Terrorism of 1999.<sup>45</sup> The principal purpose of this treaty is to require States Parties to criminalize and establish jurisdiction over the enumerated offences and reaffirms the *aut dedere aut judicare* principle concerning these crimes.

#### B. *Substantive Law: Regional Efforts*

Regional organizations, such as the European Union, are also working on common legal frameworks to define terrorist offences and several provisions of the Treaty on European Union<sup>46</sup> pertain to terrorism and mutual assistance in combating the problem. For example, Article 29 specifically lists terrorism as a crime requiring common position, while Article 30 provides for police co-operation in combating terrorism and Article 31 sets forth measures governing judicial co-operation. The European Commission has also proposed a Council Framework Decision on combating terrorism to strengthen inter-European co-operation on this issue.<sup>47</sup>

#### C. *Substantive Law: Galic Trial at the ICTY*

General Stanislav Galic, the former commander of the Sarajevo Romanija Corps of the Bosnian Serb Army is being prosecuted before the ICTY for his alleged role with respect to the Siege of Sarajevo, during a 23-month period from September 1992-August 1994. In its Pre-Trial Brief,<sup>48</sup> the Prosecution has stated that "the principal objective of the campaign of sniping and shelling of civilians was to terrorize the civilian population."<sup>49</sup> The Pre-Trial Brief elaborates upon this objective in the following terms:

The intention to spread terror is evident, *inter alia*, from the widespread nature of civilian activities targeted, the manner in which the unlawful attacks were carried out, and the timing and the duration of the unlawful acts and threats of violence, which consisted of shelling and sniping. The nature of the civilian activities targeted demonstrates that the attacks were designed to strike at the heart, and be maximally disruptive, of civilian life. By attacking when civilians were most vulnerable, such as when seeking the necessities of life, visiting friends



or relatives, engaging in burial rites or private prayer, or attending rare recreational events aimed precisely at countering the growing social malaise, the attacks were intended to break the nerve of the population and to achieve the breakdown of the social fabric.<sup>50</sup>

With respect to the legal elements required to prove the charge of inflicting terror, the Prosecution, in its Pre-Trial Brief, argued that this offence contains the following essential elements:

- unlawful acts or threats of violence;
- which caused terror to spread among the civilian population;
- the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population;
- there is a nexus between the acts or threats and an armed conflict, whether international or internal in character; and
- the Accused bears individual criminal responsibility for the acts or threats under either Article 7(1) or 7(3) of the Statute.<sup>51</sup>

The trial is expected to last into the spring of 2003, with the judgement to be rendered in mid-2003.

#### *IV. Procedural Issues*

Concerning procedural issues, the most important are those surrounding the due process rights of the accused and will obviously depend on choice of forum. Perhaps the foremost issue is whether the defendant can get a fair trial. In light of the events of September 11<sup>th</sup>, it is not unreasonable to ask if any defendant could get a fair trial before a U.S. jury for these crimes. Moreover, in preparing a defence for such crimes, it would be necessary to ensure that the accused has access to exculpatory information and the right to compel witnesses on his or her behalf. Although these rights are enshrined in the international human rights conventions concerning due process, in practice they may be extremely difficult to provide in practice.

#### *V. Evidentiary Issues*

Issues concerning evidence may also be problematic in prosecuting terrorism cases.<sup>52</sup> The gathering and safekeeping of evidence is the first potential problem. Although many of these problems are not unique to prosecuting terrorist cases, the problems raised are typically more significant than in other types of prosecutions, in part because the stakes are often much higher in terrorist cases. For example, many witnesses may be unwilling or unable to testify in such cases, and it is extremely difficult to locate the "insider" witnesses who may be crucial to obtaining a conviction. Second, there are usually significant difficulties in collecting evidence in the field, especially in cases involving bombings. Although these problems may be overcome, think of the inherent difficulties in extracting evidence from the site of the World Trade Center or in the wake of the Lockerbie crime,

where evidence was strewn over miles of the Scottish countryside. In addition, there are often cultural and language difficulties to be surmounted when interviewing witnesses or suspects, a problem that may be exacerbated by the use of codes or ambiguous language among the suspects.

Similar problems result at the trial stage, when it comes time to adduce the evidence in court. One of the most difficult hurdles to be overcome is the use in court of protected sources, such as intelligence officers and informants. Governments are often hesitant to permit testimony from intelligence sources, who may be questioned about the methods used to obtain information. The same may be said of electronic intercepts and other classified forms of information. It may be necessary to fashion unique forms of protection to allow such evidence to be used in court, depending on the forum. In those instances where established rules and jurisprudence do not permit such deviations, the prosecution of such cases may need to be abandoned or shifted to another forum.<sup>53</sup> It may also be difficult to obtain certified court interpreters who are fluent in the nuances of dialects or are attentive to certain linguistic characteristics displayed by the witnesses or co-accused in the event that they testify.

## VI. Conclusions

There are many options for bringing such perpetrators to justice, although there is no preferred method of achieving this goal, since the various types of courts all face evidentiary and procedural hurdles. Without clear legal definitions of the crimes involved, this task becomes all the more difficult. While the law may be limited in terms of the assistance that it plays in the fight against global terrorism, it nevertheless has an important role to play. As important as the prosecution of terrorists is to the international community, it is equally important to ensure that such trials are fair to the accused, because without fairness - and the perception of fairness - such trials may actually encourage other terrorists to strike.

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<sup>1</sup> Rather, as will be discussed *infra*, many international crimes fall within the rubric of "terrorism" and the choice of prosecutorial forum may determine which specific offence to charge the accused with.

<sup>2</sup> See for example, the articles published in "Agora: Military Commissions", 96 *AJIL* 320 *et. seq.* (2002); Jordan J. PAUST, "Antiterrorism Military Commissions: Courting Illegality", 23 *Mich. J.L.* (No. 1, Fall 2001), pp. 1-29; Kenneth ANDERSON, "What to do with Bin Laden and Al-Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base," 25 *Harvard J. Law & Pub. Pol.* (No. 2, Spring 2002), pp.591-634.

<sup>3</sup> Hereinafter, ICC. The ICC was discussed as a possible forum for prosecution notwithstanding the fact that the ICC came into establishment on 1 July 2002 and, pursuant to Article 11(1) of the Rome Statute of the International Criminal Court, July 17, 1998, [UN Doc. A/CONF.183/9\*, corrected in UN Doc. PCNICC/1999/INF/3\*, reprinted at 37 *ILM* 999 (1998)] (hereinafter ICC Statute), only has jurisdiction from that date forward. Consequently, the ICC has no jurisdiction over the events occurring prior to 1 July 2002. Nevertheless, the ICC will be discussed *infra*, since it is possible that future acts of terrorism may be prosecuted in that court.

<sup>4</sup> ICC Statute Article 8(1) states: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The deliberate use of the phrase "in particular" is a prosecutorial guideline, not a limitation on jurisdiction. See

the commentary on ICC Statute Article 8(1), William J. FENRICK, "Commentary on the Rome Statute of the International Criminal Court", Otto TRIFFTERER, ed., (Nomos Verlagsgesellschaft, 1999), p.181, margin 4.

<sup>5</sup> ICC Statute Article 7(1).

<sup>6</sup> ICC Statute Article 7(2)(a).

<sup>7</sup> For a description of such courts, see Daryl A. MUNDIS, "New Mechanisms for the Enforcement of International Humanitarian Law", 95 AJIL, No. 4, October 2001, pp. 934 *et. seq.*

<sup>8</sup> See Kriangsak KITTICHAISAREE, "International Criminal Law", Oxford UP, 2001, pp.38-39.

<sup>9</sup> Due to national legislation or human rights obligations, for example.

<sup>10</sup> Use of the term "military courts" includes courts-martial, military commissions and military tribunals.

<sup>11</sup> Unless specifically noted, the use of the term "military courts" in this paper refers to all three types of mechanisms. The differences between these types of courts vary depending on national legislation. Concerning the use of courts martial and military commissions under U.S. law, see Daryl A. MUNDIS, "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts" 96 AJIL, No. 2 April 2002, pp. 320-328; PAUST, *supra* note 180; ANDERSON, *supra* note 180.

<sup>12</sup> The proposed use of military commissions by the United States was criticized not on the basis of the proposal to try alleged terrorists by such commissions *per se*, but rather due to the unilateral decision by the Bush Administration to label scores of individuals as "unlawful combatants." This distinction over the source of the criticism for the proposed use of military commissions by the United States is significant. At any rate, through 1 May 2003, the United States has not conducted any trials by military commission.

<sup>13</sup> The discussion *infra* of the trial of General Stanislav Galic before the ICTY provides a good example of an on-going international trial where the accused is charged *inter alia* with inflicting terror. Although not a prosecution for "terrorism" *per se*, this case could have important ramifications for future international prosecutions.

<sup>14</sup> Clifton M. JOHNSON, "Introductory Note to the International Convention for the Suppression of the Financing of Terrorism", 39 ILM 268, 2000.

<sup>15</sup> *Id.*

<sup>16</sup> Of course, these treaties provide the legal basis for States Parties to amend their criminal codes, as required pursuant to their national constitutions, in order for these treaties to provide the bases for criminal prosecution.

<sup>17</sup> 10 ILM 133 (1971).

<sup>18</sup> *Id.*, Art. 1 (emphasis added).

<sup>19</sup> 10 ILM 1151 (1971).

<sup>20</sup> Article 2 of this treaty also criminalizes attempts and aiding and abetting in the form of accomplice liability.

<sup>21</sup> UN Doc. A/RES/3166 (1974), 13 ILM 41 (1974).

<sup>22</sup> *Id.*, Art. 1(a).

<sup>23</sup> *Id.*, Art. 1(b).

<sup>24</sup> *Id.*, Art. 1(c).

<sup>25</sup> *Id.*, Art. 1(d).

<sup>26</sup> *Id.*, Art. 1(e).

<sup>27</sup> UN Doc. A/C.6/34/L.23 (1979), 18 ILM 1456 (1979).

<sup>28</sup> *Id.*, para. 1. Paragraph 2 of this treaty criminalizes attempts and aiding and abetting in the form of accomplice liability.

<sup>29</sup> Reprinted in *"International Criminal Law: A Collection of International and European Instruments"*, Christine VAN DEN WYNGAERT and Guy SESSIONS, eds. Kluwer, 1996, p.55 *et seq.*

<sup>30</sup> See *id.*, preambular paragraph (a) for a definition of this term.

<sup>31</sup> *Id.*, Art. 7(2).

<sup>32</sup> *Id.*, Art. 7(1).

<sup>33</sup> 27 ILM 627 (1988).

<sup>34</sup> *Id.*, Art. 1.

<sup>35</sup> 27 ILM 668 (1988).

<sup>36</sup> *Id.*, Art. 1. It must be stressed that in order for any of these acts to be offenses under the treaty, the safe navigation of the vessel in question must be hindered by the act.

<sup>37</sup> *Id.*, Arts. 2(a) and (b).

<sup>38</sup> *Id.*, Art. 2(c). This provision provides: "Any person also commits an offense if that person threatens with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offenses set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question"

<sup>39</sup> 27 ILM 685 (1988).

<sup>40</sup> U.N. Doc. A/Res/52/164 (1988). See also U.N. Doc. A/Res/51/210 (1996).

<sup>41</sup> *Id.*, Art. 2(1).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, Art. 2(2).

<sup>44</sup> *Id.*, Art. 2(3).

<sup>45</sup> 39 ILM 268 (2000).

<sup>46</sup> "Official Journal of the European Communities", No. C 191, 29 July 1992, p. 1 *et seq.* as amended, see "Official Journal of the European Communities", No. C 340, 10 November 1997, p. 1 *et seq.*

<sup>47</sup> See Commission of the European Communities, "Proposal for a Council Framework Decision on combating terrorism" (presented by the Commission), Brussels, 19 September 2001, COM(2001) 521 final, 2001/0217 (CNS).

<sup>48</sup> "Prosecutor vs. Stanislav Galic", Case No. IT-98-29-PT, "Prosecutor's Pre-Trial Brief Pursuant to Rule" 65 ter (E)(i), 23 October 2001.

<sup>49</sup> *Id.*, para. 22.

<sup>50</sup> *Id.*, paras. 23-24.

<sup>51</sup> *Id.*, para. 142.

<sup>52</sup> Obviously, depending on the forum, the evidentiary and procedural issues (described in the following section) will vary.

<sup>53</sup> This may, of course, have a serious impact on either the fairness of the trial or in the public confidence of any judgement rendered, particularly if the shift in forum comes in mid-trial.

# MILITARY COMMISSIONS AND TERRORISM

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31 Denv. J. Int'l L. & Pol'y 427(2003)

[\*427]

President George W. Bush's Military Order of November 13, 2001, issued just thirty-two days after the terrorist atrocities of September 11, 2001, pointedly adopted the language of war and, almost by fiat, declared that terrorism was a war crime. As a result, under the Military Order the fight against terrorism became a "state of armed conflict" n1 and terrorist acts became "violations of the laws of war." n2

These designations abruptly erased long-held distinctions between terrorism and war crimes and represented a signal departure from pre-9/11 practice. More specifically, the Military Order has provided the theoretical underpinning for allowing foreign terrorists to be subject to trial by American military commissions. The consequence has been the largest expansion of the jurisdiction of military commissions in American history. n3

The novelty of using military commissions to try terrorists is apparent in several respects. First, unlike every other military commission ever created by the United States government, the Military Order, which is focused almost exclusively on terrorism, is designed to create tribunals not for war criminals but for terrorists. Next, terrorism and war crimes had been defined by different legal regimes. The Order, however, collapses their definitions and blurs longstanding distinctions. Finally, military commissions have never before been used to try terrorists. As a long line of U.S. Supreme Court and Attorney General Opinions demonstrate, military commissions had been restricted to members of an organized military force acting as an agent of a state or government.

Using military commissions to try terrorists, then, represents a stark departure previous practice and policy. As a result, because the commissions envisaged by the Order at last appear to be nearing realization (almost two years after the Order's issuance), the Supreme Court may have to decide the legality of this [\*428] approach. And while the government will emphasize its duty to protect national security in a time of "war," it should at least be recognized that permitting military commissions to try terrorists is a radically different approach. Indeed, supporters of the Military Order could more credibly argue that the exigencies of September 11[su'th] led to a cataclysmic transformation of international law legitimizing what had previously been illegitimate. Better to acknowledge an arguably necessary shift in the legal landscape than to assert a dubious consistency.

## I. The Military Order Creates a Forum For Trying Terrorists

In the immediate aftermath of September 11[su'th], the rhetorical and symbolic purposes of the Military Order were paramount. To begin with, the Order departed starkly from prior orders creating military commissions by focusing unambiguously on terrorism rather than violations of the laws of war. This is apparent from the face of the Order, which repeatedly mentions terrorism and terrorists and clearly is directed at persons accused of terrorist acts rather than war crimes. In the "Findings" section, for example, the Order states that "international terrorists" have committed "grave acts of terrorism" and that there is a risk of "further terrorist attacks." n4 Individuals "involved in international terrorism" may "undertake further terrorist attacks." n5 Military commissions are needed due to "the nature of international terrorism" for the "prevention of terrorist attacks." n6

The Military Order, therefore, introduced and formalized the militarization of America's response to terrorism. It repudiated the idea that terrorism is strictly a criminal justice problem and, more importantly, established the legal basis for a long-term military approach to the problem of terrorism. By embracing the notion that terrorist acts are war crimes, the Military Order provided a conceptual context that sought to legitimate overwhelming force in response. Moreover, the Order delivered this message of resolve at the outset of the military response to terrorism. As a result, those suspected of terrorism during the length of this unending war are subject to what no foreign terrorist has ever faced before: an American military tribunal staffed by U.S. soldiers as judges, no habeas corpus option and no right of appeal to civilian courts.

The text of the Military Order demonstrates its single-minded emphasis on terrorists rather than war criminals. Section 2 of the Order, describing the persons eligible for trial by military commissions, does not state that war criminals are to be subject to the commissions. Instead, the persons to be tried pursuant to the Military Order are any individual who "is or was a member of the organization known as al Qaida" and any individual who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" designed to harm "the United States, its citizens, national security, foreign policy, or economy." n7 The Military Order also permits trial by military [\*429] commission of any individual who has "knowingly harbored" current and former members of al Qaida or other persons that have engaged in, aided or abetted or conspired to commit terrorism. n8

The Military Order's ideological purposes were further evidenced by the fact that at the time of its promulgation there was no apparent intent to actually create commissions. Although various rules and regulations regarding the operation of the commissions have

Attachment 4 to RE \_\_\_\_\_

been released in the twenty months after the issuance of the Order, there has been no urgency to try persons by the commissions authorized by the Order. This is unusual. Other Presidential orders resulted in the formation of panels within a short period of time. For example, the German saboteurs prosecuted pursuant to President Roosevelt's order in 1942 were already in custody when the order was issued. n9 Within a two-month period, the saboteurs were captured, the military commission was ordered and completed its proceedings, the U.S. Supreme Court heard oral arguments and upheld the legality of the trial, and the Germans were executed. In contrast, almost two years after the Order, only preliminary steps toward actually using the commissions have been taken, further suggesting that the rhetorical purposes of the Order, at least initially, were paramount.

## II. Acts of Terrorism Have Not Been Considered Offenses Triable By Military Commissions

Military tribunals, not being courts of general jurisdiction, may only adjudicate crimes to the extent authorized to do by an act of Congress or the common law of war. The legitimacy of terrorists being tried by military commissions according to the Military Order, therefore, depends on whether such authorization exists either in a federal statute or in the laws of war. If neither Congress nor the laws of war permits such trials, any commissions created pursuant to the Military Order may be perceived as lacking legitimacy. n10

Regarding the first point, plainly Congress has never authorized military commissions to try terrorists. No U.S. statute permits military commissions to try terrorists. The statutory authority cited in the Military Order, Section 821 of the Uniform Code of Military Justice (UCMJ) does not state that military tribunals can be used to try terrorists. Instead, it simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war. The statute itself states that it "does not deprive military [\*430] commissions ... of concurrent jurisdiction [with courts-martial] with respect to offenders or offenses that by statute or by the law of war may be tried by military commission." n11

In the absence of statutory authorization, the question becomes whether the law of war, also known as international humanitarian law, permits such prosecutions. As the U.S. Attorney General opined in 1918, military courts cannot try individuals who are "not a member of the military forces" unless they are "subject to the jurisdiction of such court under the laws of war or martial law." n12 Thus, the issue is whether the laws of war, which traditionally has defined the jurisdiction of American military commissions, can be stretched to encompass terrorism. As shown below, while not entirely mutually exclusive, the acts of terrorism committed by al Qaida and other groups that are the focus of the Order cannot generally be fit into the definitional framework of international humanitarian law.

The question of whether terrorism can be defined as a war crimes and therefore come within the jurisdiction of military commissions, largely depends on whether terrorism can be defined as an "international armed conflict." The most universally accepted definition of war crimes, recognized in federal statutes n13 and elsewhere, is the "grave breaches" provisions of the four Geneva Conventions of 1949. n14 The Geneva Conventions require an "armed conflict which may arise between two or more of the High Contracting Parties" as a threshold requirement. n15 Isolated attacks over a period of years by persons associated with freelance terrorist networks unaffiliated with any government, however, generally have not been defined as an armed conflict. Thus, the threshold requirement for application of the Geneva Conventions - an "armed conflict" - is not satisfied by a conflict between one High Contracting Party (the United States) and a transnational network of terrorists (al Qaeda).

Violations of Common Article 3 of the Geneva Conventions, which apply to non-international armed conflicts taking place within the territory of a High Contracting Party, might be considered war crimes and therefore subject to military commissions. n16 However, Common Article 3 has traditionally been viewed as applying to an armed conflict between rebel or insurgent groups and a [\*431] government. The Military Order, moreover, focuses on international rather than domestic crimes. The disconnect between terrorism and the armed conflict requirement is also underscored by the unending nature of the "war on terrorism," its worldwide geographic scope and its applicability to a limitless number of parties.

These problems are compounded by the indeterminacy and controversy over the definition of terrorism. Although multilateral treaties have been concluded defining terrorism largely in terms of specific actions such as airline hijacking, hostage-taking and bombings, n17 a comprehensive treaty definition remains elusive. The notorious subjectivity of defining terrorism, therefore, further suggests an incompatibility between the scope of war crimes and terrorism.

Yet another distinction relates to the fora in which the two crimes are prosecuted. Terrorism prosecutions largely remain a prerogative of domestic courts, while war crimes are prosecuted by both domestic courts (including military courts) and international tribunals. The United States, for example, while applying an assortment of anti-terrorism provisions in the United States Code to convict foreign terrorists in federal district courts, also supports war crime prosecutions by the international criminal tribunals in The Hague and elsewhere. n18 In addition, during the drafting of the Rome Treaty on the International Criminal Court in 1996-1998, the United States vigorously opposed the inclusion of terrorism within the ICC's jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorism cases.

This dichotomy is apparent in the fact that military tribunals have never before been used to try terrorists unaffiliated with an enemy government. Indeed, as discussed in Part III below, Supreme Court precedent endorses military jurisdiction over soldiers and agents of

enemy states, but not over civilians. The President's Military Order departs from this precedent by authorizing the military trial of foreign civilians suspected of engaging in, or conspiring to commit, acts of international terrorism.

### III. The Supreme Court Has Never Approved the Use of Military Commissions to Try Foreign Terrorists

Prior to 9/11, the United States had not used military commissions to try foreign civilians unconnected to enemy armies. Instead, military commissions [432] have tried persons acting on behalf of, or at the direction of, a foreign government. n19 The Military Order does not require that defendants have any governmental connection. Quite to the contrary, the Order permits the prosecution of persons acting wholly independent of any government or conventional military group. Its very purpose is to provide a forum for a wide range of persons that have never before been prosecuted by military tribunals: foreign terrorists unaffiliated with any government.

Although the Military Order is sui generis, its advocates argue that the precedent approving military commissions in other contexts justifies the trial of terrorists by military commissions. As the White House Counsel argued shortly after the issuance of the Military Order, "the use of such [military] commissions has been consistently upheld by the Supreme Court." n20 In fact, the Supreme Court has never upheld the use of military commissions to try foreign terrorists. The Court's jurisprudence only holds that military commissions may try foreign citizens that act on behalf of a country at war with the United States. n21 The Court has also been suspicious of overly broad jurisdiction for military tribunals.

The Quirin and Yamashita cases are frequently cited for the proposition that foreign terrorists may be properly tried by military tribunals. Neither case, however, involved a foreign terrorist, and both involved persons acting as agents of an enemy government in a declared war against the United States. In Quirin, the defendants were agents of a foreign government during a declared war against the United States. They landed on the American coast wearing German military uniforms, and "received instructions in Germany from an officer of the German High Command." n22 They were paid by the German government, and trained at a German "sabotage school." n23 The charging document stated that the defendants were "enemies of the United States and acting for ... the German Reich, a belligerent enemy nation." n24

Quirin variously refers to the defendants as "unlawful belligerents," "enemy belligerents," "unlawful combatants," and "enemy combatants." Nothing in Quirin, however, supports the argument that these categories can be expanded to include foreign terrorists who are not organized as a military force, and who operate independent of any government. The defendants in Quirin themselves were, of course, agents of an enemy government during a declared war. Moreover, of the "familiar examples" of enemy combatants referenced by the Court in dicta, such as "the spy" or one who "comes secretly through the [military] lines," none encompass foreign terrorists. n25 The Court cites examples of enemy combatants [433] tried by military commissions from the Revolutionary War, the Mexican War, and the Civil War. In every instance, the enemy combatant was a member or agent of a conventional military force during a recognized armed conflict between two such military forces. n26

In Yamashita, the defendant was a Commanding General of the Imperial Japanese Army. n27 After Yamashita surrendered to the United States Army, General MacArthur ordered a military commission be convened to try him. The Supreme Court held that Yamashita was an "enemy combatant" and that the military commission was properly convened "pursuant to the common law of war." n28 The term "enemy combatant," however, was plainly used in Yamashita to connote a member of the organized military in a declared war against the United States. n29 Nothing in Yamashita supports the extension of the enemy combatant label to cover foreign terrorists. Indeed, the Court appears to limit its holding to violations of the laws of war during declared wartime:

The trial and punishment of enemy combatants who have committed violations of the law of war ... is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists - from its declaration until peace is proclaimed. n30

In Quirin and Yamashita, the Court used narrow language to uphold the jurisdiction of military commissions to try captured enemy soldiers during a declared war. These decisions nowhere provide direct support for the contention that military commissions may try terrorists. In contrast, Supreme Court decisions such as Milligan, Duncan and Reid (described below), limiting the authority of military commissions outside of the Quirin/Yamashita context, adopt broad language to restrict and limit the authority of military commissions to try civilians.

In Ex Parte Milligan, the Supreme Court held that a United States citizen could not be detained or imprisoned by the military absent a declaration of martial law. In granting Milligan's habeas corpus application, the Court held that "martial law, established on such a basis, destroys every guarantee of the Constitution and effectively renders the 'military independent of and superior to the civil power.'" n31 Similarly, in Duncan v. Kahanamoku, the Court ruled that a civilian held by the military, when the civilian courts were open and functioning, [434] cannot be tried by a military tribunal. n32

The Court again articulated the principle that military jurisdiction over civilians should be limited, not expanded, in Reid v. Covert. n33 In Reid, the Court held that the military could not exercise criminal jurisdiction over civilian defendants accused of murdering soldiers stationed overseas. The Court stated that "the Founders envisioned the army as a necessary institution, but one dangerous to liberty if



not confined within its essential bounds." n34 Reid, moreover, puts to rest the argument that Milligan is no longer good law in view of Quirin. n35 In Reid, the Supreme Court, fifteen years after Quirin, described Milligan as "one of the great landmarks in this Court's history." n36

In addition, prior Opinions of the United States Attorney General do not approve military commissions in the absence of a declaration of martial law, or when the accused is a civilian not charged with war crimes. n37 For example, in 1918 the U.S. Attorney General opined on the status of Pable Waberski, an agent of the German government sent to the United States to "blow things up." n38 Applying Milligan, the Attorney General distinguished between an "act of war" and a "crime," and concluded that the acts of espionage of which Waberski was accused did not qualify as violations of the laws of war. n39 As a result, Waberski could not be tried by a military tribunal:

In this country, military tribunals, whether courts-martial or military commissions, can not [sic] constitutionally be granted jurisdiction to try persons charged with acts or offences [sic] committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. n40

The issue of international personality informed another Attorney General Opinion approving trial by military commissions over the Mood Indian tribe. n41 The Attorney General found it appropriate to apply the rules of war to such conflicts because the Indian tribes "have been recognized as independent communities for treaty-making purposes" and are capable of engaging in "a negotiation for peace after hostilities." n42 Al Qaida, in contrast, is not recognized as [435] having the ability to engage in international treaties or peace talks.

The clarity of Milligan, Duncan and the Attorney General Opinions underscores the fact that, before 9/11, members of al Qaida were not considered "enemy combatants" and the United States was claimed to be in an "armed conflict" with al Qaida. This consensus existed even though it was known that al Qaida and bin Laden had planned and executed a series of deadly terrorist attacks against American targets; that bin Laden had issued a religious edict calling for Americans to be murdered; and that al Qaida planned future attacks against the United States. n43 Moreover, even absent the "enemy combatant" or "armed conflict" designations, the U.S. was not been prevented from undertaking military strikes against terrorist targets when necessary. The United States did so against Libya in 1985, against Iraq in 1993, and against Sudan and Afghanistan in 1998.

After September 11[su'th'], however, Quirin and Yamashita were resurrected in support of the U.S. government's argument that the response to 9/11 qualifies as a "time of war" and that foreign terrorists are "enemy combatants." These designations were intended to legitimize not only the use of military tribunals against foreign terrorists, but also the indefinite detention by military authorities of U.S. and foreign citizens in the United States and in Guantanamo Bay.

#### IV. Conclusion

Certainly the laws of war should to some extent conform to changing circumstances and not remain static. It is also true, however, that international humanitarian law should not be infinitely malleable to suit any circumstance and that our commitment to the rule of law should not be self-serving. As the Supreme Court stated in Yamashita, "we do not make the laws of war but we respect them." n44 Before September 11[su'th'], the United States regularly lambasted other countries for trying terrorists before military tribunals. Now, however, this is described as criticism of "the process and not the forum." n45 If the United States is to embark now on military trials of foreign civilians, the legal justification for this unprecedented step needs to be clearer. Continuing to justify such trials as consistent with "internationally accepted practice with deep historical roots" n46 will undermine their legitimacy. Absent a greater degree of consensus on the legality of such measures, the United States should not champion military trials of civilians as an acceptable international norm.

#### FOOTNOTES:

\* Of the New York Bar; Immediate Past Chair, Committee on International Criminal Law, ABA Section of International Law and Practice; Chair, Committee on African Affairs, Association of the Bar of the City of New York. This article arises from a paper delivered on March 23, 2002, as part of the Sutton Colloquium at the University of Denver College of Law. I am grateful to the organizers of the Colloquium, including Prof. Ved P. Nanda, Prof. Michael Scharf and Prof. Paul Williams. The views expressed herein are solely those of the author.

n1. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

n2. Id.

n3. See William H. Taft, Remarks at the OSCE Human Dimension Implementation Meeting (Sept. 10, 2002) ("The act of detaining enemy combatants is not an act of punishment. Rather, it is intended first and foremost to prevent enemy combatants from continuing to fight.") (transcript available at <http://www.osce.org/odihr/hdim/2002/doc/speech<u>1</u>.pdf>).



n4. Military Order, *supra* note 1.

n5. *Id.*

n6. *Id.*

n7. *Id.*

n8. Military Order, *supra* note 1.

n9. Appointment of Military Commission, 7 *Fed. Reg.* 5103 (July 2, 1942).

n10. The Military Order relies upon the President's authority as Commander in Chief and the Authorization for Use of Military Force Joint Resolution. 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001). The President's authority as Commander in Chief to create military commissions, however, must be exercised consistently with the laws of war. As to the Joint Resolution, it authorized the use of force, not the creation of military commissions to try terrorists. It has been argued that authorizing military force against terrorism necessarily includes authorizing military trial of terrorists. There is no evidence, however, that Congress intended to approve military commissions, which had never been used previously to try terrorists.

n11. 10 U.S.C. 821 (2003). See also *Ex Parte Vallandigham*, 68 U.S. 243, 249 (1863) ("Military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war").

n12. Trial of Spies by Military Tribunals, 31 U.S. Op. Att. Gen. 356, 364.

n13. See War Crimes Act of 1996, 18 U.S.C. 2441 (defining war crimes to mean, *inter alia*, any conduct (1) defined as a grave breach under the Geneva Conventions; (2) prohibited by Hague Convention IV; (3) that violates common Article 3 of the Geneva Conventions; or (4) willfully kills or seriously injures civilians through mines or booby-traps).

n14. Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516; Protection of War Victims: Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Protection of War Victims: Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217.

n15. *Id.* at art. 2.

n16. *Id.* at art. 3.

n17. See Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, treaty doc. 100-19.

n18. See *United States v. Bin Laden*, 92 F. Supp.2d 189 (S.D.N.Y. 2000) (upholding extraterritorial reach of U.S. criminal statutes to persons accused of bombing U.S. Embassies in Kenya and Tanzania); *United States v. Rahman*, 189 F.3d 88, 160 (2d Cir. 1999) (affirming convictions following nine-month jury trial of ten defendants for "seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism"); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of four defendants who assisted in bombing of World Trade Center).

n19. E.g., *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950) (German citizens acting "in the service of German armed forces in China" were properly convicted of violating the laws of war following trial by military commission).

n20. Alberto R. Gonzales, Martial Justice, Full and Fair, N.Y. Times, Nov. 30, 2001, at A27.

n21. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1.

n22. *Ex Parte Quirin*, 317 U.S. 1, 7-8 (1942).

n23. *Id.*

n24. *Id.* at 15.

n25. *Id.* at 12.

n26. Quirin lists the following persons as "familiar examples" of "offenders against the law of war subject to trial and punishment by military tribunals": Major Andre, an officer of the British Army; T.E. Hogg, who had been "commissioned, enrolled, enlisted or engaged" by the Confederate Army; John Y. Beall, who held a commission in the Confederate Navy; Robert C. Kennedy, a Captain of the Confederate Army; William Murphy, a "rebel emissary"; and other "soldiers and officers 'now or late of the Confederate Army.'" *Id.* at n. 9, n. 10.

n27. *In re Yamashita*, 327 U.S. 1, 4 (1946).

n28. *Id.* at 19.

n29. *Id.*

n30. *Id.* at 11 (emphasis added).

n31. *Ex Parte Milligan*, 71 U.S. 2, 124 (1866).

n32. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

n33. *Reid v. Covert*, 354 U.S. 1 (1957).

n34. *Id.* at 23-24.

n35. In *Quirin*, Attorney General Biddle disparaged *Milligan* by arguing that "the English courts have ... long since rejected the doctrine of *Ex parte Milligan*." *Quirin*, 317 U.S. at 26.

n36. *Reid v. Covert*, 354 U.S. 1 at 30.

n37. See *Military Commissions*, 11 *Op. Att'y Gen.* 297 (1865) (approving trial by military tribunal of assassins of President Lincoln because at "time of the assassination a civil war was flagrant ...[and] Martial law had been declared").

n38. *Trial of Spies by Military Tribunals*, 31 *Op. Att'y Gen.* 356 (1918).

n39. *Id.*

n40. *Trial of Spies by Military Tribunals*, 31 *Op. Att'y Gen.* 356 (1918).

n41. *The Modoc Indian Prisoners*, 14 *Op. Att'y Gen.* 249 (1873).

n42. *Id.*

n43. See generally Exec. Order No. 13,129, (July 4, 1999) (declaring a national emergency due to finding that Afghanistan was being "used as a safe haven and base operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals"); Mark E. Kosnik, *The Military Response to Terrorism*, NWC Rev. (Spring 2000) available at <http://www.nwc.navy.mil/press/review/2000/spring/art1-sp0.htm> (last visited Mar. 3, 2003).

n44. *Yamashita*, 327 U.S. at 15.

n45. Pierre-Richard Prosper, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Statement Before the Senate Judiciary Committee (Dec. 4, 2001).

n46. *Id.*



Rome Statute of the  
**International Criminal Court**

[as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999]

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Attachment 5 to RE \_\_\_\_\_

Page 1 of 5

Article 8  
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
    - (i) Wilful killing;
    - (ii) Torture or inhuman treatment, including biological experiments;
    - (iii) Wilfully causing great suffering, or serious injury to body or health;
    - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
    - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
    - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
    - (vii) Unlawful deportation or transfer or unlawful confinement;
    - (viii) Taking of hostages.
  - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
    - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
    - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
    - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
    - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
    - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
    - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
    - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death

Attachment 5 to RE \_\_\_\_\_

or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel

Attachment 5 to RE \_\_\_\_\_

using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

Attachment 5 to RE —

Page 4 of 5

- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Attachment 5 to RE     

Page 5 of 5



## U.S. Department of State, April 2000

### Introduction

The US Government continues its commitment to use all tools necessary—including international diplomacy, law enforcement, intelligence collection and sharing, and military force—to counter current terrorist threats and hold terrorists accountable for past actions. Terrorists seek refuge in “swamps” where government control is weak or governments are sympathetic. We seek to drain these swamps. Through international and domestic legislation and strengthened law enforcement, the United States seeks to limit the room in which terrorists can move, plan, raise funds, and operate. Our goal is to eliminate terrorist safehavens, dry up their sources of revenue, break up their cells, disrupt their movements, and criminalize their behavior. We work closely with other countries to increase international political will to limit all aspects of terrorists’ efforts.

US counterterrorist policies are tailored to combat what we believe to be the shifting trends in terrorism. One trend is the shift from well-organized, localized groups supported by state sponsors to loosely organized, international networks of terrorists. Such a network supported the failed attempt to smuggle explosives material and detonating devices into Seattle in December. With the decrease of state funding, these loosely networked individuals and groups have turned increasingly to other sources of funding, including private sponsorship, narcotrafficking, crime, and illegal trade. This shift parallels a change from primarily politically motivated terrorism to terrorism that is more religiously or ideologically motivated. Another trend is the shift eastward of the locus of terrorism from the Middle East to South Asia, specifically Afghanistan. As most Middle Eastern governments have strengthened their counterterrorist response, terrorists and their organizations have sought safehaven in areas where they can operate with impunity.



The amended law requires the Department of State to report on the extent to which other countries cooperate with the United States in apprehending, convicting, and punishing terrorists responsible for attacking US citizens or interests. The law also requires that this report describe the extent to which foreign governments are cooperating, or have cooperated during the previous five years, in preventing future acts of terrorism. As permitted in the amended legislation, the Department is submitting such information to Congress in a classified annex to this unclassified report.

## Definitions

No one definition of terrorism has gained universal acceptance. For the purposes of this report, however, we have chosen the definition of terrorism contained in Title 22 of the United States Code, Section 2656f(d). That statute contains the following definitions:

- The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant<sup>1</sup> targets by subnational groups or clandestine agents, usually intended to influence an audience.
- The term "international terrorism" means terrorism involving citizens or the territory of more than one country.
- The term "terrorist group" means any group practicing, or that has significant subgroups that practice, international terrorism.

The US Government has employed these definitions of terrorism for statistical and analytical purposes since 1983.

Domestic terrorism is a more widespread phenomenon than international terrorism. Because international terrorism has a direct impact on US interests, it is the primary focus of this report. Nonetheless, the report also describes, but does not provide statistics on, significant developments in domestic terrorism.

## Contents

Introduction	iii
The Year in Review	1
Africa Overview	3
Angola	3
Ethiopia	6
Liberia	6

<sup>1</sup> For purposes of this definition, the term "noncombatant" is interpreted to include, in addition to civilians, military personnel who at the time of the incident are unarmed or not on duty. For example, in past reports we have listed as terrorist incidents the murders of the following US military personnel: Col. James Rowe, killed in Manila in April 1989; Capt. William Nordeen, US defense attache killed in Athens in June 1988; the two servicemen killed in the La Belle discotheque bombing in West Berlin in April 1986; and the four off-duty US Embassy Marine guards killed in a cafe in El Salvador in June 1985. We also consider as acts of terrorist attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the site, such as bombings against US bases in Europe, the Philippines, or elsewhere.

Attachment 6 to R.F. 2 of 2